

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARTIN M. HOPWOOD, JR.	:	DETERMINATION
	:	DTA NO. 827112
for Revision of Determinations or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Periods December 1, 2011 through	:	
November 30, 2012 and March 1, 2013 through	:	
November 20, 2013.	:	

Petitioner, Martin M. Hopwood, Jr., filed a petition for revision of determinations or for refund of sales and use taxes under articles 28 and 29 of the Tax Law for the periods December 1, 2011 through November 30, 2012 and March 1, 2013 through November 20, 2013.

A formal hearing was held before Kevin R. Law, Administrative Law Judge, in Albany, New York, on January 13, 2017, with all briefs to be submitted by May 31, 2017, which date commenced the six-month period for issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (David Gannon, Esq., of counsel).

ISSUE

Whether petitioner was personally liable for the sales and use taxes due on behalf of Richards Conditioning Corp., as a person required to collect and pay such taxes under Tax Law §§ 1131 (1) and 1133 (a) for the periods December 1, 2011 through November 30, 2012 and March 1, 2013 through November 20, 2013.

FINDINGS OF FACT

1. Petitioner, Martin M. Hopwood Jr., was an officer and shareholder of Richards Conditioning Corp. (Richards), a mechanical contracting business that performed heating, ventilation, and air conditioning installation and maintenance. Richards' income was based on work it performed as a subcontractor for general contractors on numerous projects in the greater New York metropolitan area.

2. Richards was a family-owned business, created in 1951, and originally wholly-owned by petitioner's parents. Petitioner, a licensed attorney, joined Richards in the late 1990s as counsel. By 2008, petitioner's brother, Larry Hopwood, had become president of Richards and petitioner, chief financial officer. In addition, at that time, Larry and petitioner's other brother, Richie Hopwood, each owned 28 percent of Richards, while petitioner owned 22 percent. Petitioner's parents owned the remaining shares of the company.

3. In November 2006, Richards entered into a contract with general contractor F.J. Sciamè Construction Co., Inc. (Sciamè), to perform work on the construction project at the new academic building for The Cooper Union for the Advancement of Science and Art (Cooper Union) in New York City. The Cooper Union project was worth approximately \$15 million to Richards, more than double the size of any previous project the company had undertaken. Larry Hopwood negotiated the contract with Sciamè for the Cooper Union project on behalf of Richards.

4. In March 2008, Larry Hopwood relinquished his role with Richards. The departure was acrimonious, and spurred on in part by Larry's significant mistake in Richards' bid for the contract with Sciamè. Essentially, Richards' bid underestimated the Cooper Union project's cost

by approximately \$4 million, causing significant financial hardship for Richards. Upon Larry's departure, petitioner assumed control of Richards and, along with it, responsibility for all phases of its work on the Cooper Union project.

5. Despite the financial difficulties, Richards continued to work on the Cooper Union project under the direction of petitioner. However, petitioner testified that Sciamè began to renege on payments to Richards required under the contract.¹ Further, in January 2009, petitioner maintained that he was forced by Sciamè to replace several of his own employees with those from a company named F. W. Sims (Sims), on a time and material basis. According to petitioner, Sims overcharged for the work it performed and abused its overtime allowance, further hampering Richards. Sciamè paid Sims directly from funds allocated for Richards under their contract rather than simultaneously paying Richards. These efforts, according to petitioner, were made to force Richards to fail to complete the project and allow Sciamè to collect on an insurance bond that would have provided the general contractor with a windfall.

6. As a result of the difficulties arising from the Cooper Union project, in April 2009, Richards filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. Richards continued to operate as debtor in possession while in bankruptcy throughout the remaining relevant time.

7. Richards brought adversary proceedings in the course of its bankruptcy against both Sciamè and Sims, seeking redress for fraud, breach of contract, and other similar causes of

¹Official notice of the record of proceedings in *Matter of Hopwood* (Tax Appeals Tribunal, February 9, 2017) is taken pursuant to State Administrative Procedure Act § 306 (4). Pursuant to State Administrative Procedure Act § 306 (4) official notice can be taken of all facts of which judicial notice could be taken. Since a court may take judicial notice of its own records (*Matter of Ordway*, 196 NY 95 [1909]), the Division of Tax Appeals may take official notice of its record of proceedings (*see Bracken v Axelrod*, 93 AD2d 913 [3d Dept 1983]).

action. These actions appear to be pending.

8. Petitioner claimed to have personally spent more than \$1.8 million on Richards since March 2008 to allow the company to remain in operation.

9. Several examiner's reports, dated April 7, May 6 and June 16, 2010, were prepared by M. Jacob Renick, CPA/CFF, CIRA, CDBV, CFE, pursuant to an order of the Richards' bankruptcy court. One of these reports addressed potential avoidance actions against insiders and reported that disbursements from Richards were made through April 9, 2009 to or for the benefit of petitioner, his father, and brothers. Additionally, the examiner reported that during the period November 1, 2007 through April 7, 2009, petitioner deposited funds into Richards' account and withdrew funds from Richards that he deposited into his personal account. The net effect of these withdrawals and deposits was a deposit of \$1,524,806.49 into Richards' account, which was treated by Richards as a loan from petitioner. Another of the examiner's reports stated that during the period between April 9, 2009 and March 31, 2010, two of Richards' stockholders received compensation from the company. Mr. Resnick also reported that Richards paid rent to an entity owned by petitioner's father.

10. On August 3, 2012, the Division issued notices of deficiency to petitioner that asserted withholding tax penalties as a responsible person of Richards for the periods ending March 31, 2009 through March 31, 2011. On that same date, the Division also issued notices of determination asserting sales and use taxes to petitioner as responsible person of Richards for the periods ending August 31, 2009 through November 30, 2011.

11. By determination dated September 3, 2015, the Administrative Law Judge sustained the notices of deficiency and notices of determination holding that petitioner was a person

responsible for the collection and remittance of withholding and sales and use taxes to the Division. By decision dated February 9, 2017, the Tax Appeals Tribunal sustained the Administrative Law Judge's determination (*see Matter of Hopwood*, Tax Appeals Tribunal, February 9, 2017).

12. The Division also assessed petitioner's father as a responsible person of Richards for withholding tax for the periods ending September 30, 2008 through June 30, 2010 and sales and uses taxes for the periods ending August 31, 2009 through February 28, 2010. There is no indication that either petitioner's father or his estate contested these notices.²

13. On October 17, 2014, the Division issued the following notices of determination to petitioner as responsible person of Richards:

Assessment ID#	Period Ending	Tax	Interest	Penalty
L-042025315	2/29/12	\$3,225.00	\$1,461.51	\$967.50
L-042025314	5/31/12	\$4,402.78	\$1,765.64	\$1,320.67
L-042025313	8/31/12	\$3,047.94	\$1,069.09	\$5,031.22
L-042025312	11/30/12	\$2,860.58	\$866.21	\$858.05
L-042025311	5/31/13	\$0.00	\$50.00	\$13.85
L-042025310	8/31/13	\$110.06	\$101.31	\$286.30

Each of the sales tax returns for the periods in issue were signed by petitioner as President of Richards. These notices are the focus of the present matter.

14. At the hearing in this matter, petitioner requested official notice of the hearing record in the previous matter referred to in Finding of Fact 11 and introduced one additional document

² Petitioner's father died on June 25, 2011.

concerning the notices issued to his father referred to in Finding of Fact 12. Petitioner also declined to testify at this hearing instead relying upon his testimony and the hearing record from the prior proceeding and the additional exhibit.

15. For the periods in issue the record contains no evidence concerning the source of Richards' revenues or whether the Cooper Union project was still ongoing.

CONCLUSIONS OF LAW

A. Tax Law § 1133 (a) states that “every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article . . .” Tax Law § 1131 (1) in turn defines a “person required to collect any tax imposed by this article [article 28]” to include:

“any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership or any employee of an individual proprietorship who as such officer, director or employee is under a duty to act for such corporation, partnership or individual proprietorship in complying with any requirement of this article; and any member of a partnership.”

B. Whether a person is a responsible officer must be determined based upon the particular facts of each case (*see Matter of Coppolla v Tax Appeals Tribunal*, 37 AD3d 901 [3d Dept 2007]; *Matter of Hall*, Tax Appeals Tribunal, March 22, 1990, *confirmed* 176 AD2d 1006 [3d Dept 1991]). Factors stated by the Division's regulations include whether the person was authorized to sign the corporate tax return, responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11 [b] [2]).

C. The Tax Appeals Tribunal, in *Matter of Constantino* (Tax Appeals Tribunal, September 27, 1990), stated:

“[t]he question to be resolved in any particular case is whether the individual had or

could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation (*Cohen v. State Tax Commn.*, *supra*, 513 NYS2d 564, 565; *Blodnick v. State Tax Commn.*, 124 AD2d 437, 507 NYS2d 536, 538, *appeal dismissed* 69 NY2d 822, 513 NYS2d 1027; *Vogel v. New York State Dept. Of Taxation & Fin.*, *supra*, 413 NYS2d 862, 865; *Chevlowe v. Koerner*, *supra*, 407 NYS2d 427, 429; *Matter of William D. Barton*, [Tax Appeals Tribunal, July 20, 1989]; *Matter of William F. Martin*, *supra*; *Matter of Autex Corp.*, *supra*).

D. In this case, petitioner relies upon the hearing record from a prior proceeding involving his responsible person status for the period spanning March 1, 2009 through November 30, 2011, and makes the same arguments advanced therein. In that matter, the Tax Appeals Tribunal affirmed the Administrative Law Judge's holding that petitioner was a person responsible for the collection and remittance of New York State sales and uses taxes as well as withholding taxes during the periods preceding the ones at issue herein. There is nothing in this record to indicate that petitioner's responsibility lessened for the periods at issue herein. In this case, petitioner signed all the sales tax returns as president of Richards. Petitioner did not testify at the hearing to explain why he was not a person responsible for the collection and remittance of sales tax for these later periods or that he was precluded by another from acting. Instead, petitioner's case rests upon the financial difficulties that Richards found itself in as a result of the Cooper Union project. As pointed out by the Tax Appeals Tribunal in the prior proceeding, Richards' financial difficulties do not absolve an otherwise responsible person from liability arising from nonpayment of sales tax (*see Matter of Hopwood*). In addition, petitioner's claim that he acted

at the direction of his father is undermined by the fact that petitioner's father was deceased during the period in issue. Stated simply, if petitioner was not a responsible person of Richards, he has failed to meet his burden of proving it.

E. The petition of Martin M. Hopwood, Jr., is denied and the notices of determination dated October 17, 2014, are sustained.

DATED: Albany, New York
November 16, 2017

/s/ Kevin R. Law
ADMINISTRATIVE LAW JUDGE